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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 245

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Note: Where reference is made to "the Act" or sections thereof, we refer to the National Labor Relations Act as amended by the Labor Management Relations Act, 1947. We have not indexed the numerous instances in which a general reference of this nature has been made.

LEGISLATIVE AND ADMINISTRATIVE PROCEEDINGS.

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Special Notice Regarding Record References.

The printed record in the Court below consisted of an Appendix filed by the National Labor Relations Board, petitioner below, and an Additional Appendix filed by the Phoenix Mutual Life Insurance Company, respondent below. These printed pamphlets are now before this Court in their original form and are referred to herein, respectively, as "Board's App." and "Company's App." Page references are to the original pagination of such appendices. The proceedings in the Court below have been printed and filed herein, numbered separately, and are referred to herein thus, "Tr. 11".

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Phoenix Mutual Life Insurance Company, a corporation organized and existing under the laws of the State of Connecticut, prays this Court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a final decree of the said Circuit Court of Appeals enforcing an order of the National Labor Relations Board.

I.

Basis of Jurisdiction.

This is a petition to review on certiorari the decision of the Circuit Court of Appeals for the Seventh Circuit under the provisions of the Judicial Code, Section 240, as amended; March 3, 1911, C. 231, sec. 240, 36 Stat. 1157; February 13, 1925, C. 229, sec. 1, 43 Stat. 938. The decision of the Circuit Court of Appeals was rendered May 7, 1948 and the final decree was entered May 26, 1948. The case is reported below in 167 F. 2d 983.

II.

Short Statement of the Matter Involved.

This case is an enforcement proceeding under Section 10(e) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. Sec. 151. et seq) as amended (Public Law No. 101, 80th Cong. 1st Sess. Chap. 120). The petition of the National Labor Relations Board to the United States Circuit Court of Appeals sought enforcement of its order issued against petitioner on June 6, 1947, following the usual proceedings under Section 10 of the Act (73 N.L.R.B. 1463; Board's App. 8-16).

The record in this case shows that petitioner (for clarity hereinafter termed the "Company") terminated the agency contracts of two of its life insurance salesmen, Davis and Johnson (Board's App. 210-211, 214). The Board contended that the contracts were terminated under circumstances that justified an application of the extraordinary remedies afforded by the Act (Board's App. 9-10). The Company's defenses raised the following issues for determination by the Court below:

(1) Whether an Unfair Labor Practice Had Been Committed Within the Intent and Meaning of Section 8 (a) (1) of the Act.

The record showed that at the time that the Davis and Johnson agency contracts were terminated, they were concerned, in concert with several of the other life insurance salesmen, with the appointment of a particular person as Cashier of the agency with which they were connected (Board's App. 102-106). It showed that they had two meetings to discuss the subject, and worked on the draft of a letter to the Company's Home Office with respect to the matter, but that this letter was never put into final form (Board's App. 105-106). The record further showed that the Cashier's Department was a division of the Company's organization separate and distinct from its Agency Department, of which Davis and Johnson were members, and that the cashier in question would have no direct responsibility to or for Davis and Johnson. Evidence was introduced, however, intended to show that Davis and Johnson were affected by the degree of efficiency with which the particular cashier performed her duties (Board's App. 86-92, 106).

The Board contended on these facts that the identity of the particular Agency cashier was a matter of legitimate concern to Davis and Johnson and as such entitled to the protection of the Act within the meaning of the language of Section 7 thereof which provides that "employees shall have the right * * * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection". The Company contended, first, that the identity of the particular cashier was not a matter of legitimate concern to life insurance agents Davis and Johnson, as such a question had no reasonable connection with their activities in selling life insurance, and, second, that it was not the intention of Congress under the lan-

guage of Section 7 quoted above to protect concerted activity which, as is the case here, is totally unrelated to any question of union organization, collective bargaining or any of the other specific rights of employees that the Act is designed to protect. The Circuit Court of Appeals (Judge Major dissenting) held the activity of Davis and Johnson to be entitled to the protection of the Act, but cited no authorities to support that conclusion (Tr. 9).

(2) Whether the Company's Life Insurance Salesmen, Davis and Johnson, Were Employees or Independent Contractors.

Davis and Johnson were what are known as ordinary life insurance salesmen (Board's App. 183-191). The Company consistently contended below and contends now that on the record of this case, Davis and Johnson were independent contractors at common law and as such were excluded from the purview of the National Labor Relations Act by the 1947 amendment to Section 2 (3) of the Act which provides that:

> "The term 'employee' * * * shall not include * * * any individual having the status of an independent contractor * * * "

(3) Whether the So-Called "Unfair Labor Practices" so Affected Interstate Commerce as to Vest the Board With Jurisdiction Over the Matter.

The so-called "unfair labor practices" before this Court relate to the circumstances surrounding the termination of the agency contracts of two of the Company's ordinary life insurance salesmen, Davis and Johnson, and statements made to a third salesman, one Goldberg. It is asserted that the Company took this action because of certain "concerted activities" in which these men were engaging. The record shows that this activity pertained

exclusively to one letter relating to the appointment of one cashier in petitioner's Chicago-LaSalle office. The letter was discussed and put in rough draft form by the three individuals named above and several other of the Company's salesmen (Board's App. 104-107). The record clearly shows that neither union activity nor collective bargaining was involved. The record is also devoid of any showing that inter-state commerce was affected in any manner whatsoever by the above mentioned activity. This being the case, the Company contends that the Board may not properly take jurisdiction of the matter under the Act.

III.

The Questions Presented.

A.

Whether collective action by employees directed solely to the general efficiency of the employer is entitled to protection under the Act.

B.

Whether ordinary life insurance salesmen are employees or independent contractors under the Act.

C.

Whether under the Act an alleged unfair labor practice must be shown to have affected or burdened interstate commerce in some way.

IV.

Reasons Relied On For the Allowance of the Writ.

(a) The decision of the Circuit Court of Appeals in the instant case in effect holds that any concerted employee activity for any lawful purpose is within the protection of

the National Labor Relations Act. Judge Major specifically recognized this result in his dissenting opinion. Such a conclusion raises for the first time important questions with respect to the construction of Section 7 and Section 8 (a) (1) of the Act, which provide as follows:

> Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * * "
>
> Section 8.
>
> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

(b) The decision holds that the Company's ordinary life insurance salesmen are employees at common law. This result raises important questions with respect to the construction of the 1947 amendment to Section 2 (3) of the Act and the Gearhart Resolution, P. L. 642, L. 1948. This decision is in conflict with the previous decisions of the Court below on the same subject, with the decisions of Circuit Courts of Appeal of other circuits and with the decisions of this Court.

(c) The Company's alleged unfair labor practices did not burden or affect interstate commerce in any way and did not give the National Labor Relations Board jurisdiction.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

A.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported as *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Company*, 167 F. 2d 983, and in the printed transcript of record herein, p. 2.

B.

Specification of Errors.

The errors relied on are:

1. The Circuit Court of Appeals erred in holding that the concerted activities shown in the record in this case were such as to form a basis for the commission of an unfair labor practice within the intent and meaning of Section 8 (a) (1) of the Act.

2. The Circuit Court of Appeals erred in holding that ordinary life insurance salesmen Davis and Johnson were employees within the meaning of the Act.

3. The Circuit Court of Appeals erred in holding that in order to vest the Board with jurisdiction, it was not necessary for the Board to show that the so-called "unfair labor practices" affected interstate commerce.

4. The Circuit Court of Appeals erred in entering a decree enforcing the order of the National Labor Relations Board.

I.

The Decision of a Majority of the Circuit Court of Appeals in Effect Holding That Concerted Activity Directed to Any Aspect of the Employer's Business Is Within the Protection of the National Labor Relations Act Raises For the First Time Important Questions as to the Construction of Section 7 and Section 8(a) (1) of the Act.

Two of the Circuit Court of Appeals judges who heard this case below concluded that the joint concern of Davis, Johnson and the other salesmen with the identity and capability of a new cashier to be employed by the Company was within the ambit of Section 7 of the Act.

The majority recognized that no union activity was involved and no collective bargaining contemplated. They further recognized that these salesmen had no authority to appoint a new cashier or even recommend anyone for the appointment, yet concluded that their concerted activity in this regard was properly within the words "other mutual aid or protection" of Section 7. The third judge, Judge Major, reached a contrary conclusion and so stated in his dissenting opinion (Tr. 11).

The section in question, which details the rights of employees under the Act, states as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *."

Section 8 defines unfair labor practices under the Act. Sub-section (a) (1) thereof provides that it shall be an unfair labor practice for an employer:

> "To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

The majority reasoned that the words "other mutual aid or protection" were unambiguous and required a construction which included the concerted activities appearing in the record in this case. Judge Major, on the contrary, reasoned that these activities were without the stated purpose of the Act and a reasonable interpretation thereof.

It is apparent upon examination that the language of Section 7 is a virtual restatement of the provisions of Section 7(a) of the National Industrial Recovery Act (48 Stat. 198, U. S. C., title 15, sec. 707 (a)). Both the Senate and House of Representatives Reports reporting out what was later to be Section 7 of the National Labor Relations Act recognized this fact (Senate Report No. 573, 74th Cong. 1st Sess. p. 9; H. R. Report No. 1147, 74th Cong., 1st Sess. p. 15). These reports further, we believe, recognized the basic uncertainty inherent in these words. Thus in Senate Report No. 573, it is stated at page 8:

> "Sections 7 and 8. Rights of employees—Unfair labor practices.—These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in Section 8. This is made clear by paragraph 8 of section 2, which provides that 'The term "unfair labor practices" means any unfair labor practice listed in Section 8', and by section 10 (a) empowering the Board to prevent any unfair labor practice 'listed in Section 8'. Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. *Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices in their judgment are deemed to be unfair.*" (Italics ours.)

Yet in discussing the unfair labor practices enumerated

in Section 8, the first sub-section of which merely referred back to Section 7, it is stated at page 9:

> "The four succeeding unfair labor practices are designed not to impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome."

In House Report No. 1147, Section 8 was discussed in these words (page 17):

> "The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4) and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1)."

It was soon urged that these broad implications of the words "other mutual aid or protection" should be extended to cover concerted activities whether previously lawful or unlawful.

This language, considered by itself, might well warrant this interpretation, but after several contrary rulings by the Board, it is now established that it was not the intention of the Act to protect unlawful concerted activities. *N. L. R. B.* v. *Sands Manufacturing Company,* 306 U. S. 332; *Southern Steamship Company* v. *N. L. R. B.,* 316 U. S. 31; *N. L. R. B.* v. *Indiana Desk Company,* 149 F. 2d 987 (1944).

The Company contends that it was likewise not the intention of the Act to protect concerted activities which are unrelated to the purposes which the Act is designed to serve. As Judge Major states in his dissenting opinion (Tr. 11):

> "It must be remembered that no labor dispute or labor union, or the right to form, join or assist a labor organization, or any right on the part of the

> salesmen, or refusal on the part of the respondent to bargain collectively, as those terms are defined by the Act and many times construed by the courts, are involved. Neither is there any grievance concerning wages, rates of pay, hours of employment or conditions of work. In fact, the grievance is not only petty but personal and private in its nature."

We contend that the contrary result reached by the majority of the Circuit Court of Appeals is without precedent and for the first time expands the meaning of the Act to cover mutual aid not related to collective bargaining, union activity, wages, hours, rates of pay or conditions of work. We made this same contention to the Circuit Court of Appeals, *yet the majority does not cite a single authority to support its decision adverse to our contention.*

As Judge Major points out, the present grievance is personal and private in its nature. In reality only the personal fortunes of two individuals, salesmen Davis and Johnson, are at stake. These individuals have assumed the role of private litigants by filing their so-called Additional Statement for the Record (Company's App. 1-8) and their Petition to Amend the Decision and Order of the Board (Company's App. 9-10). The Company can only conjecture as to the reason for the Board's interest in the matter, but submits that the entire proceeding represents an attempt by the Board to extend its jurisdiction beyond the bounds of the statute and beyond the limits which have heretofore been sanctioned by the Courts.

The decision of the majority of the Court below has broad implications. The record clearly shows that these salesmen were concerning themselves with a subject that has heretofore been considered the prerogative of management. If, as the majority of the Court holds, these individuals had a legitimate interest in the identity of the cashier because of the effect her efficiency might have upon their activities, why would they not have a similar interest

in the identity of the petitioner's president, its attorneys, or any of its other management functions? Judge Major felt that this result inescapedly followed from the majority decision.

If such is the case, management retains its identity under the Act in name only, for it seems to us that if concerted activities of this type are among the rights guaranteed to employees under Section 7 of the Act, that management must bargain collectively with respect to them. True the Board seeks to avoid such an implication in the present proceeding (Board's App. 31) but the result is there nevertheless. Certainly such a result is contrary to the manifest intention of the Act and should be so stated to be the case by this Court. Thus are raised in extreme form the issues of compulsory collective bargaining presented in the pension plan case: *In the Matter of Inland Steel Company and Local Union Nos. 1010 and 64, United Steel Workers of America (CIO)*, 77 N. L. R. B. 1, decided by the Board on April 12, 1948, and now pending before the Circuit Court of Appeals for the Seventh Circuit.

II.

Whether an Ordinary Life Insurance Agent Is an Employee or an Independent Contractor Is a Question of Substantial Importance Not Only Under the National Labor Relations Act But Also Under the Social Security Act and Internal Revenue Code.

In recent years, the much litigated question as to the circumstances under which an individual is to be considered an employee on the one hand or an independent contractor on the other, has been before this Court and before the Congress of the United States on several occasions.

At the risk of repeating what to this Court is already obvious, we shall trace chronologically the treatment that

has been given to this subject. In *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U. S. 111, decided in 1944, this Court held that newsboys were employees within the meaning of the National Labor Relations Act. On July 26, 1946, the Trial Examiner issued his Intermediate Report in the present case. In reaching his conclusion that the ordinary life insurance salesmen involved in this proceeding were employees, he relied heavily on the decision of this Court in the *Hearst* case and so stated (Board's App. 28). The Board's order, issued on June 6, 1947, adopted this finding of the Trial Examiner (Board's App. 8). On June 23, 1947, Congress enacted certain amendments to the Act. One of these amendments, that to Section 2 (3), modified the definition of an employee so as to provide:

> "The term 'employee' * * * shall not include * * * any individual having the status of an independent contractor * * *"

An examination of the Congressional proceedings antecedent to the enactment of this legislation, amply demonstrates that it was the intention of Congress by virtue of the amendment to Section 2 (3) quoted above, to modify the interpretation of the employee-independent contractor relationship announced by this Court in the *Hearst* case. Thus in H. R. Report No. 245, 80th Cong., 1st Sess., p. 18, the Committee stated:

> "It is inconceivable that Congress, when it passed the (original) Act, authorized the Board to give to every word in the Act whatever meaning it wished. On the contrary, Congress intended then, as it intends now, that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved (in the *Hearst* case), the Bill excludes 'independent contractors' from the definition of 'employee'."

Petitioner contends that the present issues must properly be determined under Section 2 (3) of the Act as thus amended on the authority of the decisions of this Court in *L. A. Young Spring & Wire Corporation* v. *N.L.R.B.*, 163 F. 2d 905 (C. C. A. Dist. of Col., 1947) (certiorari in effect denied—*Foreman's Association of America* v. *L. A. Young Spring & Wire Corporation*, 333 U. S. 837); *Budd Manufacturing Company* v. *N. L. R. B.*, 332 U. S. 840.

The Circuit Court of Appeals in our case so held but nevertheless concluded that an application of the common law standards in determining the relationship required a finding that the ordinary life insurance salesmen before this Court were employees.

Such was the sequence of events in so far as the amendment to National Labor Relations Act is concerned. In the meanwhile, a sharp conflict had developed in the District and Circuit Courts of Appeal with respect to the construction to be given the word "employee" under the Social Security Act. In *United States of America* v. *Silk* and *Harrison* v. *Greyvan Lines, Inc.*, 331 U. S. 704, and *Bartels* v. *Birmingham*, 332 U. S. 126, all decided in June of 1947, this Court announced its views on the subject.

None of these cases concerned life insurance agents. This was not surprising, however, as in addition to the general Treasury Department regulations delineating coverage under the Act on the basis of the common law employee-independent contract delineation (United States Treasury Department Regulations 90, promulgated under Title IX of the Social Security Act, Art. 205), there were specific Treasury Department Regulations defining the status of life insurance agents (U. S. Treasury Department Regulations 107, filed September 13, 1940, Section 403.225). Under these regulations, life insurance agents compensated solely on a commission basis were excluded from coverage under the Social Security Act, while so-called industrial insurance agents were included thereunder. Similar

Treasury Department regulations excluded ordinary life insurance agents from the withholding provisions of the Internal Revenue Code (United States Treasury Department Regulations 111, Sec. 29.143-2).

In November of 1947, the Treasury Department, relying upon the decisions of this Court in the *Silk, Greyvan* and *Bartels* cases, proposed new regulations which generally would have brought all life insurance agents, among others, under the Social Security Act (Proposed United States Treasury Department Regulations published in F. R. Vol. 12 No. 232, dated November 27, 1947, at page 7966).

These proposed regulations in turn prompted Congressional action which culminated in June of 1948 in the enactment of P. L. 642, L. 1948 (hereinafter termed the "Gearhart Resolution"). This legislation amended Title XI of the Social Security Act so as to add the following italicized language to Section 1101 (a) (6) thereof:

> "The term 'employee' includes an officer of a corporation, *but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules.*"

By the same bill, identical amendments were made to Section 1426 (d) and Section 1607 (i) of the Internal Revenue Code relating respectively to withholding of income taxes from compensation paid and to unemployment compensation payments.

The legislative history of the Gearhart Resolution shows that it intended to prevent the application of any other than common law tests in determining who is an independent contractor, even in the presence of the decisions of this Court in the *Silk, Greyvan* and *Bartels* cases. Thus in Report No. 1255 of the Senate Finance Committee, 80th Congress, 2nd Sess., it is stated at page 7:

"In view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an 'employee' for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.

"But * * * if it be argued that the Supreme Court decisions establish a new definition of 'employee', then it is the purpose of this resolution (H. J. Res. 296) to establish its meaning according to the usual common-law rules, realistically applied."

In Report No. 1319 of the House Ways and Means Committee, 80th Congress, Second Session, the majority report stated at page 2:

"The Treasury, pursuant to the Administrative Procedure Act, approved June 11, 1946, published notice in the Federal Register to amend the existing regulations, and apply tests other than the usual common-law tests for determining employer-employee relationship.

* * * * * *

"It is claimed by the Treasury that the proposed regulations are made necessary by the decisions of the Supreme Court in the *Silk* case (1947) (67 S. Ct. 1463), the *Greyvan Lines, Inc.* (67 S. Ct. 1463), the *Bartels case* (1947) (67 S. Ct. 1547), and related cases.

"In these cases, the Court rejected the traditional and long-standing test of control as the sole basis for determining whether an individual is an employee."

Whereas the minority report stated at page 12:

"The Treasury Department has prepared regulations in accordance with the Supreme Court decisions. The employees affected are entitled to benefits, and certainly should not be deprived of such protection merely because of prior improper interpretation of the Social Security Act and the Internal Revenue Code. This will be the result, however, if the House Joint

> Resolution 296 is enacted. So, the bill would curtail social-security coverage. It cannot be disguised as maintenance of the status quo. Furthermore, it very probably would do greater harm than deprive the employees directly in question of the coverage originally granted them by Congress. Despite the intent to maintain the status quo, the bill, as amended, would prescribe the 'usual common-law rules' in determining the employer and employee relationship for social-security purposes."

No Treasury Department regulations have as yet been proposed construing the provisions of the Gearhart Resolution and no regulations have as yet been issued by the National Labor Relations Board construing the analogous provisions of Section 2 (3) of the Act. An examination of the conflicting District and Circuit Court of Appeals decisions on the subject only adds to the uncertainty and confusion.

Thus in this case, the Circuit Court of Appeals posed as the question for its determination, whether the life insurance salesmen before it were employees or independent contractors. In holding that they were employees, the Court relied solely on its decision in *Williams* v. *United States*, 126 F. 2d 129 (1942), cert. den. 317 U. S. 655. This case involved the status of a band leader under the Social Security Act, precisely the same type of person before this Court in the *Bartels* case. We have already alluded to the uncertainty which has arisen as to the scope of this Court's decision in the *Bartels* case, and to the fact that under existing Treasury Department regulations, ordinary life insurance salesmen are independent contractors within the meaning of the Social Security Act. Yet they are held in the present case to be employees under the National Labor Relations Act.

A majority of state court decisions as to the employee-independent contractor status of ordinary life insurance

agents are contrary to the decision of the court below. The following decisions hold ordinary life insurance agents to be independent contractors at common law: *New York Life Insurance Company* v. *Murphy*, 388 Ill. 316, 319, 320, 58 N. E. 2d 182 (1944); *Vert* v. *Metropolitan Life Insurance Company*, 342 Mo. 629, 117 S. W. 2d 252, 166 A. L. R. 1381 (1938); *American National Insurance Company* v. *Denke*, 128 Texas 229, 95 S. W. 2d 370, 107 A. L. R. 409 (1936); *Luquire Insurance Co.* v. *McCalla*, 244 Ala. 479, 13 So. 2d 865 (1943); and *American Savings Life Insurance Co.* v. *Riplinger*, 249 Ky. 8, 60 S. W. 2d 115 (1933).

The following decisions on the other hand hold them to be employees: *Chatelain* v. *Thackeray*, 98 Utah 525, 100 Pac. 2d 191 (1940); and *Life and Casualty Co.* v. *Unemployment Compensation Commission of Virginia*, 178 Va. 46, 16 S. E. 2d 357 (1941).

We submit that the above analysis amply demonstrates that, in view of the recent legislation on the subject, a further delineation by this Court of the line between an employee and an independent contractor is highly essential to a proper administration and uniform application not only of the National Labor Relations Act but also the Social Security Act; that this is particularly true in the case of life insurance agents, a group whose large numbers play a vital role in our national economy.

III.

The Holding of the Circuit Court of Appeals That the So-Called "Unfair Labor Practices" Need Not Be Shown to Have Been a Burden Upon Interstate Commerce Is Contrary to the Intention of the Act, to Previous Decisions of This Court and the Previous Decisions of the Circuit Court of Appeals.

The record amply shows that the petitioner carries on a general nation-wide insurance business and in its overall operations is engaged in interstate commerce within the decisions of this Court. It has been contended that this fact in and of itself vested the Board with jurisdiction under the Act. Thus, the Trial Examiner found (Board's App., p. 22):

> "Once it is established that unfair labor practices have occurred in an industry engaged in interstate commerce, or in an industry whose business affects interstate commerce, the Board is charged with the responsibility of correcting them."

The Board in its order adopted this finding of the Trial Examiner without qualification. The Court, we believe, reached its decision on this same basis, for it found that the Board need not show that the asserted unfair labor practices had been a burden on interstate commerce or that there was an actual stoppage in the flow of such commerce or an immediate likelihood thereof.

Petitioner urges that this result is contrary to the plain intention of the Act and to previous decisions of this Court and this same Circuit Court of Appeals. Section 10 (a) of the Act provides that in order to vest the Board with jurisdiction, the so-called unfair labor practices must affect interstate commerce. Section 2 (7) of the Act defines "affecting commerce" as follows:

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

In *N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, this Court established the following standard for the construction of this language (pages 31 and 32):

"This definition (of the words 'affecting commerce') is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. (Citing cases.) It is the effect upon commerce, not the source of the injury, which is the criterion."

* * * * *

"Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to Federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed."

This standard was followed in *Santa Cruz Fruit Packing Co.* v. *N.L.R.B.*, 303 U. S. 453 where this Court stated at page 467:

"The question that must be faced under the Act upon particular facts is whether the unfair labor prac-

tices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."

To like effect, the Circuit Court of Appeals for the Seventh Circuit posed the issue in *Indianapolis Power & Light Co.* v. *N.L.R.B.*, 122 F. 2d 757, 759-760 (1941), in these terms:

"* * * did the alleged unfair labor practices actually threaten interstate or foreign commerce in a substantial manner, * * *"

These decisions thus define the limits of the Board's jurisdiction not in terms of the general nature of the employer's operations, but in terms of the effect of the *particular* alleged unfair labor practices (which concern the activities of both the employer and employee) upon interstate commerce. It seems to us that only by weighing the facts of each case in the light of this standard, is the requirement of the Act that the unfair labor practices affect commerce given any meaning. The decision in the instant case announces a far different standard which is clearly at variance with what has heretofore been considered the established rule. The result produces a conflict of decision and confusion that should be resolved by this Court.

IV.

Suggestions.

It is respectfully submitted that the issues determined by the Circuit Court of Appeals in this case raise broad issues as to the spirit in which the National Labor Relations Act is to be interpreted and the purposes which it is designed to serve. As the events of the last two years have shown, it is the wish of the American people that the Act serve as a means of fairly balancing the interests of labor and management to the end that the two groups may work harmoniously together to promote the common weal.

The decision of the majority of the Circuit Court of Appeals in this case is patently contrary to this pattern. Its implications deny management any identity whatsoever under the Act, and places the extraordinary machinery provided for in the Act to protect public rights in the hands of individuals who wish to advance only their own personal interests.

Judge Major clearly recognized this result in his dissenting opinion. The case is without precedent and raises for the first time questions as to the construction to be given to the Act which go to the very heart of the labor-management relationship. For this reason, petitioner urges that the judgment of the Circuit Court of Appeals be reviewed by this Court as provided by law.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 245

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions in the court below (S. P. 2-11)[1] are reported in 167 F. 2d 983. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 8-44) are reported in 73 N. L. R. B. 1463.

[1] The record before this Court consists of the appendix to the Board's brief in the court below, herein designated "B. A.", the appendix to the Company's brief in the court below, herein designated "C. A.", and the supplemental proceedings in the court below, herein designated "S. P."

JURISDICTION

The decree of the court below (S. P. 12-14) was entered on May 26, 1948. The petition for certiorari was filed on August 26, 1948. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now Section 1254 of 28 U. S. C., as codified June 25, 1948) and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether life insurance salesmen who are required to devote their full time to the Company's business and who are furnished office space, desk, telephone and supplies by the Company which also pays for their indemnity bonds and license fees and closely supervises their sales efforts, are employees or independent contractors within the meaning of Section 2 (3) of the National Labor Relations Act, as amended.

2. Whether the conduct of insurance salesmen in meeting to discuss the effect upon their efficiency of the frequent change of cashiers, designating one of their number to draft a letter to the Company setting forth their views respecting this matter and revising such a letter, constituted concerted activities for mutual aid or protection within the meaning of Section 7 of the National Labor Relations Act.

3. Whether the National Labor Relations Board is empowered to remedy the unfair labor practice

of an employer engaged in interstate commerce where there is no showing that the unfair labor practice has actually affected or burdened interstate commerce.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Supp. I, 141 *et seq.*) are set forth in the Appendix, *infra*, pp. 22-26.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on June 6, 1947, issued its findings of fact, conclusions of law, and order (S. P. 8-15). The pertinent facts, as found by the Board, may be summarized as follows:

The Phoenix Mutual Life Insurance Company, hereinafter called the Company, is a mutual life insurance company engaged in the business of selling and issuing life insurance policies and annuities and in the investment of its funds in real estate and a variety of securities (B. A. 19; 141, 146). On the basis of total insurance in force, the Company ranks no lower than twenty-fourth among all insurance companies in the United States (B. A. 19; 49, 142, 146). The Company had in force on December 31, 1945, $[illegible]4,789,831

worth of insurance (B. A. 19; 142, 146). On the same date its total assets amounted to $386,044,844, including United States Government bonds valued at $146,324,512, Canadian Provincial bonds valued at $72,834,695, and bank, insurance and public utility stocks having a market value of $3,529,776 (B. A. 19; 141-142, 146). The industrial, public utility, banking, and insurance corporations whose securities are owned by the Company, operate on a nation-wide basis (B. A. 19; 142, 146).

The Company has its principal office in Hartford, Connecticut (B. A. 19; 141, 146). It conducts business in thirty-three states and in the District of Columbia (B. A. 19; 142, 146). It has two branch offices in Chicago, Illinois, one of which, known as the Chicago-LaSalle office was staffed in September 1944 with a manager, Herbig, ten insurance salesmen, a cashier, assistant cashier, and four clerks and stenographers who worked under the supervision of the cashier (B. A. 19, 23-24; 56, 74-75, 100, 105. 111, 141, 146). The personnel working within the Chicago-LaSalle office are constantly engaged in the solicitation of applications for insurance, the collection of premiums, and the forwarding of such applications and premiums to the home office (B. A. 20-21; 50-54, 68, 77-78, 153). Likewise they render various services to policyholders and beneficiaries, in connection with the payment of benefits to them (B. A. 20-21; 77-78). Some of the salesmen stationed at the Chicago-LaSalle office are assigned to solicit and service customers

in an area including parts of both Illinois and Indiana (B. A. 96, 117).

The Company selected its agents from among those persons who made written applications for these positions and after personal interviews with them, much as individuals are selected for other positions in the business world (B. A. 26; 66-67, 165-180). To be selected as an insurance salesman it was not necessary for the applicant to have had previous experience at selling insurance or any other commodity (B. A. 177-179, Tr. 197).

Each person selected, after signing an agency contract with the Company, is given intensive training by the Company's supervisory staff (B. A. 26; 51, 72, 75-76, 115-116). He spends the first two weeks of his employment in the Company's offices, receiving instructions from the Company's office manager or other supervisory personnel in regard to the use of company forms, the company rate books, the making of various reports required by the Company, the keeping of records of the agents' business activities, and in sales talks prepared by the Company for the use of its agents (B. A. 26; 51, 72, 96, 115, 193, 74, 95). The Company has publicized this training period as essential if "agents were to earn the living to which they were entitled, and if the public was to receive the life insurance service it had a right to expect" (B. A. 26; 193). The agents are required to attend staff meetings weekly, or at least once a month, at which times they receive various instructions in regard

to their sales work, are notified of contests conducted by management, and occasionally receive policyholder leads from management (B. A. 27; 76, 83-84, 97, 116).

The Company furnishes each salesman with office space, a desk, a telephone, stenographic service, stationery, postage, filing cabinets, sales supplies and business cards (B. A. 26-27; 53, 64, 82, 89, 95-96, 109). It also pays for the indemnity bonds and license fees which the State of Illinois requires of each insurance agent (B. A. 27; 95).

Each salesman is required to devote his full time to the Company's business (B. A. 27; 52-53, 68, 71, 162, 186). He may not assign his contract and may not employ anyone to work under him (B. A. 27; 186). He is paid on a commission basis and under some circumstances receives fees and bonuses in addition (B. A. 26; 68, 71, 73, 77-78, 97, 183-185, 200, 201, 209). The Company requires each salesman to produce a specified minimum of new business each year; if he fails to do so, he is discharged, that is, his contract is cancelled upon thirty days' notice (B. A. 28; 71, 74, 95, 191, 192).

The Company maintains a plan for the retirement and pensioning of its salesmen (B. A. 29; 114). This retirement and pensioning plan is non-contributory on the part of its salesmen, although they have the privilege of increasing their retirement income through voluntary participation (B. A. 29; Bd. Exh. 20, pp. 7-8).

The cashier's department in the Chicago-LaSalle office in addition to acting as a service department to the public and to the home office, has the responsibility of serving the salesmen efficiently (B. A. 23; 136, Tr. 390). It maintains records concerning applications received and policies issued, collects premiums from salesmen or policyholders, disburses initial commissions to salesmen and furnishes them with stenographic service (B. A. 23; 96, 119, Tr. 371-373, 377). It is also the function of the cashier's department, when requested, to furnish information to salesmen concerning policies, premiums, dividends, conversions, and beneficiaries, and in general to assist them with information not generally known or published (B. A. 23; 85-87, 89-90, 119, Tr. 370-380, 385-388). Employees of the cashier's department work in close cooperation with the salesmen who are often aided or hindered by the degree of efficiency displayed by them (B. A. 23; 84, 135-136, Tr. 383, 390). Inconvenience, embarrassment, added work, or even loss of sales to prospective customers have resulted to the salesmen from such incidents as an error which a cashier made in calculating costs to guide the salesmen in dealing with prospective policyholders, the erroneous application by the cashier of dividends which had accrued to a policyholder, the inability of a cashier to furnish answers to particular questions concerning policies, and faulty information supplied by a cashier respect-

ing a settlement agreement (B. A. 23-24; 86-88, 89-92, 99, 136).

On or about September 1, 1944, Herbig, the manager of the Chicago-LaSalle Office, called a meeting of the salesmen and announced the resignation of the cashier. He told them that the matter of a successor was under consideration by the home office and that a new cashier would probably be sent in from another branch office (B. A. 24; 97-98). This announcement was of considerable importance to the salesmen by reason of their dependence upon the cashier's department for information and assistance affecting their earnings (B. A. 24; 89-92, 99). During the two weeks after Herbig's announcement, the salesmen discussed the matter of a successor at length (B. A. 24; 97-98).

On the morning of September 11 and again at lunch that day, the salesmen met to consider their dissatisfaction over the fact that the Company had had four different cashiers during the last few years, resulting in inconvenience to them and loss of their time in "breaking in" new cashiers (B. A. 24; 57-58, 99-101, 132). They discussed the advisability of making a recommendation to the Company in regard to the situation (*ibid.*). All of them agreed that the Company's then assistant cashier was well qualified to fill the vacancy and that they would prefer her to an outsider but there was some disagreement as to whether the salesmen should recommend the appointment of any

specific person (B. A. 24; 57, 100, 106-107). Salesman Clarence M. Davis was designated by the group to write a letter in regard to the cashier situation which, if approved and signed by all of the ten salesmen, was to be sent to the home office (B. A. 24; 104). Davis, with the assistance of Salesman W. Donald Johnson and other salesmen, prepared a tentative draft of such a letter which was discussed and revised at another luncheon meeting of the salesmen (B. A. 24; 104-107).

Before its contents had been finally decided upon, Manager Herbig learned of the proposed letter and questioned Salesman Goldberg about it (B. A. 24; 58). Goldberg explained that the final drafting of the letter had not been completed and that he therefore did not know what the contents would be (B. A. 24-25; 58). Herbig thereupon advised him not to sign it (B. A. 25; 58-59).

On September 15, before Davis had an opportunity to put the letter in final form, he and Johnson, who had been assisting him, received notices from the Company terminating their agency contracts and letters explaining the summary action (B. A. 25; 107-108, 124, 210-211, 214-215). Except for the prefatory sentence to Johnson's letter stating that "For some time your disregard and disapproval of the Phoenix Mutual, its Staff, and most of its programs have been quite apparent to observers," the letters to both Johnson and Davis were identical (B. A. 25, n. 15; 210, 214). Each stated, "Your recent actions and involvement in the

resignations and new appointment affecting our Cashier's Department has been so far beyond the premise of your responsibility, and so completely unpleasant that in full agreement with the Home Office we are cancelling your Agent's Contract, effective thirty days from today" (B. A. 25, n. 14; 210, 214). The letters instructed Davis and Johnson to turn in their supplies and rate books and to have their desks cleaned out and their agency affairs closed by noon of the following day, September 16 (*ibid.*).

Although Herbig informed Johnson immediately after discharging him that he was disliked by personnel in the home office, the Company offered no explanation for this statement (B. A. 12, n. 3; 124-125).

Upon the basis of the foregoing facts the Board concluded that the salesmen were employees of the Company within the meaning of Section 2 (3) of the Act and not independent contractors (B. A. 25-29), that their conduct in discussing the replacement of the cashier and in taking steps towards presenting their views to the Company constituted concerted activities for mutual aid or protection within the meaning of Section 7 of the Act (B. A. 10-11, 29-32), that the Company, by discharging Davis and Johnson for such concerted activities and by warning Goldberg not to participate therein, engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (B. A. 8-9, 32-35), and that these unfair labor

practices tend to lead to labor disputes burdening and obstructing commerce (B. A. 35). The Board accordingly ordered the Company to cease and desist from such unfair labor practices, to reinstate Davis and Johnson with back pay and to post the usual notices (B. A. 14-15).

The Board filed a petition for enforcement of its order in the court below (B. A. 1-5) and on May 7, 1948, the court, with one judge dissenting, handed down its opinion (S. P. 2-11) sustaining the Board's order in full. On May 26, 1948, the court entered its decree of enforcement (S. P. 12-14).

ARGUMENT

1. The Company contends (Pet. 12-18) that it is important for this Court to decide whether the insurance agents were employees or independent contractors, particularly in the light of the amendatory legislation in which, the Company claims, Congress has manifested its disapproval of the test prescribed by this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, *United States* v. *Silk*, 331 U. S. 704, and *Bartels* v. *Birmingham*, 332 U. S. 126.[2]

The court below in the instant case, however, did not refer to any of the above decisions but only to

[2] The Labor Management Relations Act, 1947 amended Section 2(3) of the original National Labor Relations Act so as to provide:

> "The term "employee" * * * shall not include * * * any individual having the status of an independent contractor * * *.

its prior ruling in *Williams* v. *United States,* 126 F. 2d 129, certiorari denied, 317 U. S. 655, in which it applied the common law test of employee relationship. The opinion below on its face (S. R. 5-7) makes it plain that the court was giving effect to the common law principles which it is claimed Congress approved in the recent legislation referred to. The case thus raises no question as to the test to be applied, for even under the narrow common law doctrine the insurance agents have been properly held to be employees.[3]

Whether the insurance salesmen here involved were employees and not independent contractors

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The Gearhart Resolution of June 14, 1948 (Pub. Law 642, 80th Cong., 2d Sess.) amended the definitional clauses of the Social Security Act so as to contain the following provision:

> The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

[3] The Company contends that all the issues in this case must be determined under the Act as amended by the Labor Management Relations Act (Pet. 14). The only change upon which the Company relies is the express exclusion of independent contractors from the benefits of the Act. Section 2 (3) of the Act as amended, *infra*, p. 24. Since the Board here found that the agents were not independent contractors (B. A. 27), we believe that its order is not affected by the amendments. But, in any event, the amendments have no retroactive effect as to portions of the order which remedy past violations. *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board,* 332 U. S. 840, and the Board's brief therein. Thus, the right of the employees to reinstatement with back pay is governed by the original Act, which was in effect at the time of their discharge.

turns, of course, upon the facts of the particular case and would ordinarily not present a question worthy of review by this Court.

The Company contends that this case places before the Court an issue as to the status of "ordinary life insurance agents" (Pet. 5, 12), described as "a group whose large numbers play a vital role in our national economy" (Pet. 18). The court below pointed out that the Company "regarded its salesmen as being in a somewhat different class than ordinary insurance salesmen" (S. P. 7). Indeed the Company publicly advertises that it is "the only company on the American continent which employs a small, compact, and exclusively full-time sales representation" (B. A. 170). The description of the relationship between the Company and the agents here involved, as set forth in the decisions of the Board (B. A. 25-29) and the court below (S. P. 5-7), shows that these agents differed in many important respects from the agents described in the cases cited by petitioner (Pet. 18) which hold that the particular life insurance salesmen there involved were not employees.[4] In cases where the facts show a rela-

[4] In the first case cited by the Company (Pet. 18) for the proposition that ordinary life insurance agents are independent contractors at common law, the actual holding was that such agents were employees for the purpose of the Illinois Unemployment Compensation Act. *New York Life Insurance Co.* v. *Murphy*, 388 Ill. 316, 58 N. E. 2d 182. In the second case cited the insurance company was held not liable for injuries inflicted by an insurance agent whom the court held to be an employee in his relationship to the company in collecting industrial debits but not an employee when exercising his

tionship which most nearly approaches that here shown, the courts have held the relationship to be that of employer-employee. See e.g., *Chatelain* v. *Thackeray,* 98 Utah 525, 100 P. 2d 191; *Miller* v. *Metropolitan Life Insurance Co.,* 134 Ohio St. 289, 16 N. E. 2d 447; *Unemployment Compensation Commission of N. C.* v. *Jefferson Standard Life Insurance Co.,* 215 N. C. 479, 2 S. E. 2d 584; *Fidelity Union Life Insurance Co.* v. *McGinnis* (Tex. Civ. App.), 62 S. W. 2d 186; *Industrial Commission* v. *Northwestern Mutual Life Insurance Co.,* 103 Colo. 550, 88 P. 2d 560; *Life and Casualty Ins. Co.* v. *Unemployment Compensation Commission of Virginia,* 178 Va. 46, 16 S. E. 2d 357; *Hall* v. *Sera,* 112 Conn. 291, 152 Atl. 148.

Furthermore, we submit, the Board and the court below were clearly correct in finding that the salesmen were employees rather than independent contractors. As we have seen, they had no independent calling or business of their own and were

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option to sell life insurance outside the scope of his regular employment, the accident having occurred while the agent was returning from a call to sell life insurance made outside the area assigned to him for his industrial insurance activities. *Vert* v. *Metropolitan Life Insurance Co.,* 342 Mo. 629, 117 S. W. 2d 252, 116 A. L. R. 1381. The next two cases (*American National Insurance Co.* v. *Denke,* 128 Tex. 229, 95 S. W. 2d 370; *Luquire Insurance Co.* v. *McCalla,* 244 Ala. 479, 13 So. 2d 865) do not involve life insurance agents but rather industrial insurance agents whom petitioner elsewhere labels "debit collectors" who are to be distinguished from life insurance agents (See Point II under the Summary of Argument at Pet. i and also p. 14). The last case cited involved an agent who, unlike the agents here involved, sold insurance for a number of companies. *American Savings Life Insurance Co.* v. *Riplinger,* 249 Ky. 8, 60 S. W. 2d 115.

obliged to devote their entire working time to the Company's business (*supra*, pp. 5-6).

The Company not only had the right to exercise a large measure of control over the work of its salesmen—an important element in determining the employer-employee relationship—but it actually exercised this right. It gave each salesman detailed instructions in regard to its business upon hiring him, even preparing sales talks for him and, during the early period of his tenure, accompanying him while he made his sales presentations and afterwards criticizing such presentations (B. A. 54, 116). By virtue of the very nature of the work, the Company could not, of course, continue to direct and control all the details of the salesmen's activities. This is true of many persons having unquestioned employee status.

Even after the initial training period had passed, however, the Company continued to exercise a substantial amount of control over its salesmen. It did this in part through the instructions and assistance it rendered to the salesmen in individual conferences with them, through the regular staff meetings, and through the various educational opportunities offered them (B. A. 76, 83-84, 97, 116-117). It was able further to check and supervise the work of the salesmen through weekly reports in which the salesmen were required to furnish a detailed account of their daily activities and the amount of time spent in such activities (B. A. 80, 97, 152, 195). The Company, moreover,

could effectively control the work of its salesmen by withholding certain commissions which would otherwise be payable if a salesman failed to produce a specified minimum annual requirement, and by discharging or terminating its contract with salesmen for the reason that they failed to maintain minimum requirements or for any other reason which it might choose (*supra*, p. 6). The power to discharge, like the power to hire, is of course, in itself an important element of the right to control. See *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 523; *Williams* v. *United States*, 126 F. 2d 129, 132 (C.C.A. 7), certiorari denied, 317 U. S. 655.

Another important consideration stamping the salesmen as employees in this case is the permanent character of the relationship which the Company attempted to establish. The retirement and pensioning plan maintained by the Company for its salesmen (*supra*, p. 6) are irreconcilable with the Company's claim that the salesmen are independent contractors.

In view of the controlling factors mentioned above, it becomes relatively unimportant that the Company's salesmen were paid on a commission basis rather than on a salary or wage basis. It is well established that persons paid on a commission or fee basis may be considered employees. See *United States* v. *Silk*, 331 U. S. 704, 706; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523.

Furthermore, the Company bore the expenses of the salesmen's office facilities and supplies. A true independent contractor furnishes his own place of business and bears the expense of maintaining it. This expense is usually a part of the risk or the chance for profit and loss which the independent contractor must assume. See, e.g., *Restatement of the Law of Agency,* Sec. 220 (2) (e); *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722; *Williams* v. *United States,* 126 F. 2d 129, 132, certiorari denied, 317 U. S. 655. In this case it is the Company that invests its money in the work of the salesman and bears the risk of financial loss. The salesman invests no capital and, like a piece-worker, can stand to lose little but his time.

2. The holding of the Board (B. A. 8-10) and the court below (S. P. 9) that the conduct of Davis and Johnson in discussing with the other salesmen their interest in a more permanent cashier and in drafting a letter to the Company setting forth their interest was concerted activity for mutual aid and protection is in accord with the plain language of the Act, and the decisions under it. Section 7 of the original Act provided:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose

of collective bargaining or *other mutual aid or protection.*[5] [Italics supplied]

If, as the Company argues (Pet. 9-12), Congress had intended to protect only concerted activities for the purpose of forming a labor organization and bargaining collectively the phrase "other mutual aid or protection" would not have been used. The word "other" makes clear that Congress intended to protect from employer interference not only concerted activities of employees in connection with the formation and administration of labor organizations and collective bargaining, but also activities for mutual aid and protection other than those connected with unionization and collective bargaining. The Act has been so construed by the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Peter C. K. Swiss Choc. Co.*, 130 F. 2d 503, in which a discharge of the president of a union for drafting a resolution in support of a farmers' strike was held to violate the statute.

As the Board found (B. A. 9-10), the manner in which the cashier's department functioned had a direct effect upon the work of the salesmen.

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[5] While the determination as to whether the Company committed an unfair labor practice must, of course, be governed by the original Act (see Section 102 of the Labor Management Relations Act, *infra*, p. 26), any doubts as to the intent of Congress to protect activities unrelated to unionization were clarified by the insertion of the word "other" before the phrase "concerted activities" in the Act as amended. Compare Section 7 of the original Act (*infra*, p. 23) with Section 7 of the amended Act (*infra*, p. 25).

They depended upon this department for stenographic service, record keeping, computation of premiums and benefits, receipt and disbursement of premiums, commissions and benefits, drafting of conversion plans, and information concerning policies, premiums, dividends, beneficiaries, and Company regulations pertaining to policies (B. A. 9, 23-24; 85-87, 89-93, 119-120). The previous frequent changes in the personnel of this department had not only burdened the salesmen with the time consuming process of continually "breaking-in" new people (B. A. 24; 57-58, 99-101, 133), but resulted in delays and mistakes which actually jeopardized the salesmen's ability to get or retain customers (B. A. 23-24; 86-92, 99, 135-136). Thus, the salesmen were directed not to contact the home office for information but to obtain it through the cashier's department (B. A. 93, 118). The delay of a day or two in obtaining information or computations as to premium rates, conversion plans or amount of possible benefits often meant the loss of a customer who changed his mind while waiting (B. A. 90). The last cashier had not known much about figuring conversions (B. A. 89-90). Among the mistakes which had occurred were several instances of miscalculation of the premium resulting in either overcharges or undercharges which the salesmen then had to correct (B. A. 87). Several customers had complained that their premium deposit fund had been applied to pay premiums although their contract had specified that this

fund was to be allowed to accumulate and bills for premiums be sent the customer (B. A. 92). Policies prepared embodied agreements different from the one which the customer had specified (B. A. 88).

It is evident that not only the conditions under which the salesmen worked, but also their earning capacity were affected by the manner in which the cashier's department was operated. The Board was therefore amply justified in finding that "what these salesmen did was closely related to their legitimate interests as employees. In essence, their activity consisted of common discussion of circumstances which they considered elements of grievance concerning their working conditions, and preparation of a method for presenting the grievance to their employer. This was reasonable and temperate conduct by employees who had a real cause for concern" (B. A. 10). And this finding in turn adequately justified the conclusion of the Board (B. A. 10) and the court below (S. P. 9) that "the moderate conduct engaged in by Davis and Johnson bore a sufficiently reasonable relation to the conditions of their employment to fall within the ambit of the statute."

3. As the court below pointed out (S. P. 3) "There can be no doubt as to the act's application to the business of [the Company]. *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643." It is clearly unnecessary to show

that interstate commerce has been interrupted in the particular case. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 320, 326; *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 495 (C.C.A. 9) certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380, 383 (C.C.A. 6) certiorari denied, 320 U. S. 740; *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 980 (C.C.A. 8) certiorari denied, 323 U. S. 751.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no conflict of decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1948.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any

Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

2. The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Supp. I, 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * *

"DEFINITIONS

"SEC. 2. When used in this Act—

* * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

* * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, * * *.

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